TRANSCRIPT OF RECORD

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1936

No. 62

THE UNITED STATES OF AMERICA, APPELLANT

vs.

CHARLES RESNICK AND JOSEPH RESNICK, PARTNERS TRADING AS L. RESNICK AND SONS

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE EASTERN DISTRICT OF PENNSYLVANIA

FILED MAY 15, 1936

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1 In United States District Court for the Eastern District of Pennsylvania

No. 6688. June Term, 1935

THE UNITED STATES

vs.

CHARLES RESNICK, AND JOSEPH RESNICK, PARTNERS, TRADING AS L. RESNICK AND SONS

For U. S.: Charles D. McAvoy, Esq.
For Deft.: S. L. Einhorn, Esq.
(Unlawfully selling hampers for fruits and vegetables of a size not authorized by Act of Congress)

Docket entries

1935
Sept. 11—True bill.
Sept. 13—Order of Court to take bail for each defendant in $500 filed.
Sept. 18—Appearance of S. L. Einhorn, Esq., for defendants, filed.
Sept. 23—Demurrer filed.
1936
Mar 6—Argued sur demurrer.
Mar. 11—Opinion Welsh, J., sustaining demurrer to indictment filed.
Apr. 14—Order of Court sustaining demurrer filed.
Apr. 14—Petition for appeal to Supreme Court of the United States filed.
Apr. 14—Assignment of errors filed.
Apr. 14—Order of Court allowing appeal filed.
Apr. 14—Statement of Jurisdiction filed.
Apr. 14—Citation allowed and issued.
Apr. 14—Praecipe for transcript of record filed.
Apr. 22—Affidavit of service of copy of notice of appeal, etc., filed.
Apr. 24—Statement of defendants against jurisdiction filed.

2 In United States District Court

[Title omitted.]

Indictment

Filed Sept. 11, 1935

COUNT I

The Grand Inquest of the United States of America, inquiring in and for the Eastern District of Pennsylvania, upon their oaths and affirmations, do present that on or about January 25, 1933, at Philadelphia, in the Eastern District of Pennsylvania and within the jurisdiction of this Court, CHARLES RESNICK and JOSEPH RESNICK, partners, doing business under the name of L. RESNICK AND SONS,

having their principal place of business at Philadelphia aforesaid, did knowingly, willfully, and unlawfully sell for fruits and vegetables certain two-quart metal hampers, to wit: 500 two-quart metal hampers, to the Great Atlantic & Pacific Tea Company, Philadelphia, Pennsylvania, which said hampers then and there did not comply with the Act of Congress of May 21, 1928 (45 Stat. 685, known as the United States Standard Container Act of 1928), in that they were not of any standard size authorized by said Act for hampers
3 for fruits and vegetables and did not come within any tolerance established by the Secretary of Agriculture pursuant to said Act for hampers so standardized, and which facts defendants then and there well knew:

Contrary to the form of the Act of Congress in such case made and provided and against the peace and dignity of the United States of America.

COUNT II

And the Grand Inquest aforesaid, inquiring as aforesaid, upon their respective oaths and affirmations as aforesaid, do herein further present that on or about April 1, 1934, at Philadelphia, in the Eastern District of Pennsylvania and within the jurisdiction of this Court, CHARLES RESNICK and JOSEPH RESNICK, partners, doing business under the name of L. RESNICK AND SONS, having their principal place of business at Philadelphia aforesaid, did knowingly, willfully, and unlawfully sell for fruits and vegetables certain two-quart metal hampers to wit: 100 two-quart metal hampers, to Brown Brothers, Philadelphia, Pennsylvania, which said hampers then and there failed to comply with the Act of Congress of May 21, 1928 (45 Stat. 685, known as the United States Standard Container Act of 1928) in that they were not of any standard size authorized by said Act for hampers for fruits and vegetables and did not come within any tolerance established by the Secretary of Agriculture pursuant to said Act for hampers so standardized, which facts said defendants then and there well knew:

4 Contrary to the form of the Act of Congress in such case made and provided and against the peace and dignity of the United States of America.

COUNT III

And the Grand Inquest aforesaid, inquiring as aforesaid, upon their respective oaths and affirmations as aforesaid, do herein further present that on or about May 16, 1935, at Philadelphia, in the Eastern District of Pennsylvania and within the jurisdiction of this Court, CHARLES RESNICK and JOSEPH RESNICK, partners, doing business under the name of L. RESNICK AND SONS, having their principal place of business at Philedelphia aforesaid, did knowingly, wilfully, and unlawfully sell for fruits and vegetables certain two-quart metal hampers, to wit: 25 two-quart metal hampers, to the New Liberty Market, Philadelphia, Pennsylvania, which said hampers then and

there failed to comply with the Act of Congress of May 21, 1928 (45 Stat. 685), in that they were not of any standard size authorized by said Act for such hampers and in that they did not come within any tolerance established by the Secretary of Agriculture pursuant to said Act for hampers so standardized:

Contrary to the form of the Act of Congress in such case made and provided and against the peace and dignity of the United States of America.

5 COUNT IV

And the Grand Inquest aforesaid, inquiring as aforesaid, upon their respective oaths and affirmations as aforesaid, do herein further present that on or about March 1, 1935, at Philadelphia, in the Eastern District of Pennsylvania and within the jurisdiction of this Court, CHARLES RESNICK and JOSEPH RESNICK, partners, doing business under the name of L. RESNICK AND SONS, having their principal place of business at Philadelphia aforesaid, did knowingly, wilfully, and unlawfully sell for containers for fruits and vegetables certain two-quart metal hampers, to wit: 50 two-quart metal hampers, to G. A. Bossler, Philadelphia, Pennsylvania, which said hampers then and there failed to comply with the Act of Congress of May 21, 1928 (45 Stat. 685) known as the United States Standard Container Act, in that they were not of any standard size authorized by said Act for such hampers and in that they did not come within any tolerance established by the Secretary of Agriculture pursuant to said Act for hampers so standardized:

Contrary to the form of the Act of Congress in such case made and provided and against the peace and dignity of the United States of America.

CHARLES D. McAVOY,
United States Attorney.

PHILADELPHIA, PA., September 10, 1935.

7 In United States District Court

[Title omitted.]

Demurrer to indictment

Filed September 23, 1935

AND NOW, to wit: September 23, 1935, come Charles Resnick and Joseph Resnick, partners, trading as L. Resnick & Sons, and by their Attorney, Samuel L. Einhorn, Esq., demurs to the indictment filed and all of the counts thereof, and for grounds of demurrer assigns the following:

1. The sale of two-quart metal hampers for fruits and vegetables, as alleged in Counts I, II, III, and IV of the indictment is not a violation of the Act of May 21, 1928, 45 Stat. 685.

2. The Act of Congress approved May 21, 1928, applies to fruits and vegetables of the capacity set forth therein and does not apply to two-quart metal hampers for fruits and vegetables.

3. The enforcement of the Act of Congress approved May 21, 1928, 45 Stat. 685, would deprive the defendants of liberty and property without due process of law in violation of the Fifth Amendment to the Constitution of the United States.

4. The regulation of hampers for fruits and vegetables insofar as an attempt is made to fix the size of hampers that may be manufactured, shipped, and sold in intrastate commerce is beyond the power of Congress.

8 5. Under the Constitution of the United States Congress is without power to make unlawful the manufacture for sale or shipment or the sale of two-quart hampers for fruits and vegetables in intrastate commerce.

6. Under the constitution of the United States the Congress is without power to fix the size of hampers for fruits and vegetables that may be manufactured for sale or shipment or sold in intrastate commerce.

WHEREFORE, defendants pray that this Indictment and all the counts thereof be dismissed.

SAMUEL L. EINHORN,
Attorney for Defendants.

9 In United States District Court for the Eastern District of Pennsylvania

No. 6688. June Term, 1935

UNITED STATES OF AMERICA

vs.

CHARLES RESNICK AND JOSEPH RESNICK, PARTNERS, TRADING AS L. RESNICK & SONS

Opinion sur demurrer to indictment

Filed March 11, 1936

WELSH, J.: The proceedings herein involve an indictment arising out of the alleged sale by Charles Resnick and Joseph Resnick, trading as L. Resnick & Sons, of certain two-quart metal hampers to the Great Atlantic & Pacific Tea Company, Brown Brothers, The New Liberty Market, and G. A. Bossler, Philadelphia, Pennsylvania. The indictment separately charges the defendant with knowingly, wilfully, and unlawfully selling for fruits and vegetables certain two-quart metal hampers, in violation of the Act of Congress approved May 21, 1928 (45 Stat. 685), known as the United States

Standard Container Act of 1928, in that they were not of any standard size authorized in said Act for such hampers and in that they did not come within any tolerance established by the Secretary of Agriculture pursuant to said Act for hampers so standardized.

10 A demurrer to the indictment was filed alleging that the sale of said hampers was not in violation of the Act and raising certain Constitutional questions.

The Standard Container Act of 1928 is an outgrowth of and supplements the Standard Container Act of 1916 (Public, 248, 64th Congress), which fixed standards for grape baskets, berry baskets, and small till baskets. Prior to the introduction of this Act, and its reference for consideration to the Committee on Agriculture and Forestry, similar bills had been considered for a period of several years. The Act in question provides as follows:

"That the standard hampers and round stave baskets for fruits and vegetables shall be of the following capacities: one-eight' bushel, one-fourth bushel, one-half bushel, five-eight's bushel, one bushel, one- and one-fourth bushels, one-and-one half bushels, and two bushels, which, respectively, shall be of the cubic content set forth in this section. For the purposes of this Act a bushel, standard dry measure, has a capacity of two thousand one hundred and fifty and forty-two one-hundredths cubic inches."

The issue was so framed in this case that the constitutionality of the Act or the interstate character of the business is not involved. The real question is, does the Act of 1928 forbid the use of a metal container or hamper holding two quarts for the purpose of selling fruits or berries? It will be noted that the Act of 1916 provides for small containers for berries, et cetera. The government admits that there is no violation of the Act of 1916 in this case. They base their indictment entirely upon the Act of 1928, which Act makes neither provisions nor penalty for using a container less than one-eighth (4 quarts) of a bushel. The government specifically contends that no one has the right under the Act of 1928 to use any container less than one-eighth of a bushel.

11 At the argument counsel for the government stated that such interpretation was reasonable and that the government was justified in so holding because of the grant of power to the Congress by the Constitution to regulate weights and measures. Government counsel also advance the argument that notwithstanding the admitted fact that the two-quart measure or two-quart hamper in question contained the legal amount of cubic space of one-sixteenth of a bushel, as said bushel is defined in the Act, it was such an unlawful variance from the provisions of the Act as amounted to a breach of the law.

It is difficult to understand how this argument can be accepted as logical. The purpose of the Congress was to provide for a uniform law covering commodities sold in hampers and containers. We are entirely familiar with the confusion that existed before the passage of this Act. Containers of various shapes and sizes, having no spe-

cific relation to a fractional part of a bushel were on the market, leading to confusion, deception and dishonesty. In order to guard against such consequences Congress said by the Act of 1928 that, beginning with a hamper of the size of one-eight of a bushel as the minimum size up to the maximum of a hamper of the size of two bushels, the various hampers should be in accordance with the sizes enumerated in the Act. Congress having done this the government now says in plain english that no one has a right to use a hamper of less than one-eighth of a bushel in size. The Court cannot consider such argument as indicative of what the Congress actually intended and actually legislated upon. While it may not be entirely judicial to say so, the Judge writing this opinion was a member of the Congress when this legislation was passed and by reason of his
12 interest therein followed the matter very closely for some years prior to the Act of 1928 having been passed.

If the construction placed upon this Act by the government and by counsel at the argument is accepted it would mean that packages between the sizes of one quart and four quarts could not be used in the United States today. And this, notwithstanding the admitted fact that the two quart hamper or a two quart hamper contained the full and honest and lawful cubic contents of the fractional part of a legal bushel that it purported to be. Counsel for the government even went further and advanced in support of his contention the theory that the government was justified in so construing the Act of 1928 because the hamper used by this defendant being of metal invaded a prior preempted or monopolized field occupied by the makers and users of wooden hampers. If such view were to be accepted judicially it would mean that the government could not only provide standards of measures for hampers but they would have the power to regulate the manner in which a citizen should do business. Clearly, under the constitutional grant to regulate the standards of weights and measures there could be no such authority, and Congress did not say so in the Act. This is evidently an interpretation placed upon the Act of 1928 that is not warranted.

We consider that this case is of considerable importance, both from the viewpoint of the Department of Agriculture and to the defendant involved. It is of even greater importance to the citizen at large. One of the greatest opportunities for the merchant or producer of any commodity, either manufactured or grown, lies in the field of packing his product in an attractive and an alluring container. As long as the fractional part of the bushel is in ac-
13 cordance with the table of measures, such as pints and quarts is adhered to, if the size of hamper be one or two quarts, honest, lawful cubic capacity, the merchant or dealer, the producer or the farmer has a field which lies open before him under the law to display his good taste, his artistic ability, and his business judgment by selecting the kind of a container or hamper that he desires.

In other words, protection to the public and not restriction of legitimate activities was the aim of the Congress. We feel that this

is what the Congress meant and this is what the Congress said in the Acts of 1928 and 1916. Until Congress itself attempts by legislation to go further neither the Department nor the Courts have a right to do so.

The sustaining of the Demurrer is not based upon the intra-state character of the business. Under the weights and measures provisions of the Constitution interstate business is not required. Nor is the constitutionality of the Act involved. While that question was raised in defendant's brief it was not stressed at the argument. However, inasmuch as it was mentioned in the brief of defendant we are dismissing the matter by saying that we do not consider that there is any merit in such an objection.

Notwithstanding the very able and forceful argument of counsel for the government the Court has reached the above conclusions and the Demurrer is, therefore, sustained.

March 11, 1936.

14 In United States District Court

[Title omitted.]

Order sustaining demurrer

Filed April 14, 1936

AND NOW, to wit: this 14th day of April 1936, it is ORDERED that the Demurrer to the Indictment in the above entitled cause be, and the same is hereby SUSTAINED and defendants discharged without day, to which the plaintiff excepts and the exception is allowed.

By the Court:

(S.) WELSH, *J.*

15 In United States District Court

[Title omitted.]

Assignment of errors

Filed April 14, 1936

Comes the United States of America, plaintiff herein, by Charles D. McAvoy, United States Attorney for the Eastern District of Pennsylvania, and avers that in the record proceedings and judgment herein there is manifest error, and against the just rights of said plaintiff in this, to wit:

1. That the court committed material error against plaintiff in sustaining the demurrer of the defendants Charles Resnick and Joseph Resnick, partners, trading as L. Resnick and Sons, to each and every count of the indictment.

2. That the court committed material error against plaintiff in sustaining said demurrer in holding that the provisions of the Stand-

ard Container Act of May 21, 1928, are inapplicable to the sale of two-quart size hampers for fruits and vegetables.

Wherefore, for all of the above information appearing on the face of the record proceedings and judgment herein plaintiff avers that material error was committed prejudicial to it in this cause and prays that the judgment of the District Court be reversed.

This the 14th day of April, 1936.

Charles D. McAvoy,
(S.) CHARLES D. MCAVOY,
United States Attorney.

[Copy]

16 In United States District Court

[Title omitted.]

Petition for appeal to the Supreme Court of the United States

Filed April 14, 1936

Comes the United States of America, plaintiff herein, and states that on the 11th day of March 1936, a demurrer of the defendants, Charles Resnick and Joseph Resnick, partners, trading as L. Resnick and Sons, to each and every count of the indictment herein was by the court sustained, and the plaintiff feeling aggrieved at the ruling of said district court in sustaining said demurrer, prays that it may be allowed to appeal to the Supreme Court of the United States for a reversal of said judgment and order, and that a transcript of the record in this cause duly authenticated, may be sent to said Supreme Court of the United States.

Petitioner submits and presents to the court herewith a statement showing the basis of the jurisdiction of the Supreme Court to entertain an appeal in said cause.

UNITED STATES OF AMERICA
By Charles D. McAvoy,
(S.) CHARLES D. MCAVOY,
United States Attorney,
Eastern District of Pennsylvania.

17 In United States District Court

[Title omitted.]

Order allowing appeal to Supreme Court of the United States

Filed April 14, 1936

This cause having come on this day before the court on the petition of the United States of America, plaintiff in the above entitled cause, praying an appeal to the Supreme Court of the United

States for a reversal of the judgment herein sustaining a demurrer of the defendants, Charles Resnick and Joseph Resnick, partners, trading as L. Resnick and Sons, to each and every count of the indictment in said cause, and that a duly certified copy of the record of said cause to be transmitted to the Clerk of the Supreme Court of the United States, and the Court having heard and considered said motion, together with plaintiff's statement showing the basis of the jurisdiction of the Supreme Court to entertain an appeal in said cause, the same having been duly filed with the clerk of this court, it is, therefore, by the court ordered and adjudged that the plaintiff herein, the United States of America, be, and it is hereby, allowed an appeal from the order and judgment of this court in sustaining the demurrer of the defendants, Charles Resnick and Joseph Resnick, partners, trading as L. Resnick and Sons, to the indictment to the Supreme Court of the United States, and that a duly certified copy of the record of said cause be transmitted to the Clerk of the Supreme Court. It is further ordered that the United States of America be, and it is hereby, permitted a period of forty days from the date hereof in which to file and docket said appeal in the Supreme Court of the United States.

This 14th day of April 1936.

WELSH, *District Judge.*

18 [Citation in usual form showing service on Samuel L. Einhorn omitted in printing.]

19 In United States District Court

[Title omitted.]

Praecipe for transcript of record

Filed April 14, 1936

To the Clerk of the United States District Court for the Eastern District of Pennsylvania:

The appellant hereby directs that in preparing the transcript of record of this cause in the United States District Court for the Eastern District of Pennsylvania, in connection with its appeal to the Supreme Court of the United States, that you include the following:

1. Indictment.
2. Demurrer.
3. Opinion.
4. Judgment sustaining demurrer.
5. Petition for appeal to the Supreme Court.
6. Statement of jurisdiction of Supreme Court.
7. Assignment of errors.
8. Order allowing appeal.

9. Notice of service on appellee of petition for appeal, order allowing appeal, assignment of errors, and statement as to jurisdiction.
10. Citation.
11. Praecipe.

Charles D. McAvoy,
S. CHARLES D. MCAVOY,
United States Attorney, Eastern District of Pennsylvania,
Counsel for Appellant.

20 [Clerk's Certificate to foregoing transcript omitted in printing.]

21 In Supreme Court of the United States

Statement of points relied upon and designation of entire record for printing

Filed May 20, 1936

Pursuant to Rule 13, Par. 9, of this Court the Appellant states that it intends to rely on all of the points in its assignment of errors.

The appellant deems the entire record, as filed in the above entitled cause, necessary for the consideration of the points relied upon.

STANLEY REED, *Solicitor General.*

22 Service acknowledged May 21, 1936.

S. L. EINHORSE,
Counsel for Appellee.

[File endorsement omitted.]

(Endorsement on cover:) File No. 40,589. E. Pennsylvania, D. C. U. S. Term No. 62. The United States of America, appellant vs. Charles Resnick and Joseph Resnick, Partners Trading as L. Resnick and Sons. Filed May 15, 1936. Term No. 62. O. T. 1936.

U. S. GOVERNMENT PRINTING OFFICE: 1936